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IN THE COURT OF APPEALS OF INDIANA

LEE HARDACRE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0801-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
DIVISION III
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0408-FC-414

June 3, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Lee Hardacre (Hardacre), appeals the trial court's determination that he violated his probation.

We affirm.

ISSUES

Hardacre raises two issues on appeal, which we restate as:

(1) Whether his probation violation counsel was ineffective for failing to object to the trial court's admission of evidence concerning field sobriety tests that had been administered to him; and

(2) Whether there was sufficient evidence to support the trial court's determination that he violated his probation by failing to pay child support.

FACTS AND PROCEDURAL HISTORY

On August 15, 2005, Hardacre pled guilty to nonsupport of a dependent child, as a Class C felony, Ind. Code § 35-46-1-5. On August 29, 2005, the trial court sentenced Hardacre to four years executed at the Madison County Work Release Facility and four years suspended to probation.

On August 30, 2007, Madison County Sheriff's Deputy Justin Webber (Deputy Webber) noticed a vehicle turn left at a red light onto 38th Street in Madison County, Indiana. Deputy Webber stopped the vehicle, which Hardacre was driving, approached, and spoke with Hardacre through the driver's side window. Deputy Webber smelled alcohol and asked Hardacre if he had consumed any alcoholic beverages. Hardacre responded that he had

had three or four beers. Deputy Webber gave Hardacre three field sobriety tests. Hardacre failed the horizontal gaze nystagmus test and the one leg stand, but passed the walk and turn test. Hardacre agreed to submit to a chemical breath test, but provided two invalid breath samples, after which he claimed to be unable to provide a sufficient sample because he was a smoker. Deputy Webber determined that a blood sample was necessary, and transported Hardacre to a local hospital. But Hardacre refused to submit to a blood draw at the hospital; so, Deputy Webber took him to the detention center to have him watched while he obtained a warrant to have Hardacre's blood drawn.

Deputy Webber returned with the signed warrant, and transported Hardacre back to the hospital. He attempted to show the warrant to Hardacre, but Hardacre refused to look at it. Deputy Webber then read it aloud to Hardacre, and Hardacre attempted to walk away. Deputy Webber escorted Hardacre back to his chair, and repeatedly instructed him to remain seated and wait for the nurse. Hardacre attempted to slip his hands, which were handcuffed together behind his back, underneath his legs, and Deputy Webber ordered him to stop. Hardacre said "let's get it on" and flexed like he wanted to fight. (Transcript p. 30). Deputy Webber and another officer grabbed Hardacre and ordered him to lie on the ground. Hardacre resisted and kicked at Deputy Webber, hitting his finger, causing it to swell and hurt. Deputy Webber put Hardarce in a "figure four" leg lock while the other officer and an emergency room security officer helped restrain him. (Tr. p. 31). After a couple of minutes, Hardacre calmed down and agreed to submit to the blood draw.

On September 5, 2007, the State filed a Notice of Probation Violation listing Hardacre's alleged criminal offenses of operating while intoxicated, disorderly conduct, resisting law enforcement, and battery "as filed in Elwood City Court," as probation violations. (Appellant's App. p. 30). The Notice also listed Hardacre's failure to pay child support and his alleged consumption of alcoholic beverages as violations of his probation.

On September 24, 2007, the probation court held an evidentiary hearing where Deputy Webber testified to the events on the evening of August 30, 2007, and documents concerning Hardacre's child support payments and obligations were entered as evidence. The probation court found, at the close of evidence, by a preponderance of the evidence, that Hardacre had violated his probation when he operated a vehicle while intoxicated, failed to pay child support, and consumed alcohol. The probation court revoked Hardacre's probation and ordered the remainder of his sentence to be served at the Indiana Department of Correction.

Hardacre now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Effectiveness of Probation Revocation Counsel*

Hardacre requests this court to find that his counsel at the probation violation revocation hearing was ineffective. We acknowledge that a probation revocation hearing is in the nature of a civil proceeding; therefore, the State need only prove a violation by a preponderance of the evidence. *See Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). The grant of probation or conditional release is a favor granted by the State, not a right to which a criminal defendant is entitled. *Sanders v. State*, 825 N.E.2d 952, 955 (Ind.

Ct. App. 2005), *trans. denied*. "It should not surprise, then, that probationers do not receive the same constitutional rights that defendants receive at trial." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007), *reh'g denied*. However, because probation revocation implicates the defendant's liberty interests, he is entitled to some procedural due process before the State can revoke that favor. *Sanders*, 825 N.E.2d at 955.

> In a probation revocation proceeding, the minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation.

Gosha v. State, 873 N.E.2d 660, 663 (Ind. Ct. App. 2007). In addition to these due process rights, Indiana Code section 35-38-2-3(e) provides, in pertinent part, that probationers have a right to be represented by counsel at probation revocation hearings.

Typically, we review a defendant's claims of ineffective assistance of trial or appellate counsel under the two prong test announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *See Williams v. State*, 883 N.E.2d 192, 196 (Ind. Ct. App. 2008).[1] However, because probation revocation is akin to a civil proceeding, we apply a "less stringent standard of review in assessing counsel's

[1] First, the defendant must show that his counsel's performance was deficient, or more specifically, it fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. *Id.* Second, the defendant must show that the deficient performance resulted in prejudice. *Id*. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.

performance" when considering the effectiveness of counsel at probation revocation hearings. *Childers v. State*, 656 N.E.2d 514, 517 (Ind. Ct. App. 1995), *trans. denied*. "If counsel appeared and represented the [probationer] in a procedurally fair setting which resulted in judgment of the court, it is not necessary to judge his performance by rigorous standards." *Id*. (citing *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989)).

Hardacre argues that his counsel at the probation violation hearing should have objected because the State failed to lay a proper foundation prior to the testimony about the field sobriety tests. He contends that the State failed to elicit testimony from Deputy Webber "regarding either his training or experience in administering field sobriety tests, or that the procedure was properly administered." (Appellant's Brief p. 9). However, from our review of the record, we note that Hardacre's counsel vigorously attempted to refute the reliability of the field sobriety tests administered by Deputy Webber on cross examination. Deputy Webber responded that he had received training about the tests at the Indiana Law Enforcement Academy and that it was pursuant to his training and experience he was able to determine that Hardacre was intoxicated. (Tr. pp. 34, 36). He also testified that it was standard operating procedure to inquire about medical history prior to administering the one leg stand test. (Tr. p. 37). In revocation hearings, evidence is admissible if it bears some substantial indicia of reliability. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. Therefore, had Hardacre's counsel objected to a lack of foundation prior to Deputy Webber's testimony about the field sobriety tests, the State would have been able to cure that error by

laying a proper foundation. For this reason, we conclude that Hardacre received representation at a procedurally fair setting, and his counsel was not ineffective.

II. *Sufficiency of Evidence that Hardacre Failed to Pay Child Support*

Additionally, Hardacre contends that the State did not present sufficient evidence to prove, by a preponderance of the evidence, that he violated his probation by failing to pay child support. Specifically, he argues that the State did not present evidence that he "recklessly, knowingly or intentionally failed to pay," as required by I.C. § 35-38-2-3(f).

First, we note that a trial court may revoke a person's probation upon evidence of a violation of any single term of probation. *Washington v.State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). Therefore, the State had presented sufficient evidence to support the revocation of Hardacre's probation by proving by a preponderance of the evidence that Hardacre had operated a vehicle while intoxicated and consumed alcohol. Nevertheless, we choose to address the merits of Hardacre's contention.

Our legislature has pronounced that the payment of child support is an appropriate condition of probation. I.C. § 35-38-2-2.3. However, our legislature has also expressed that, "Probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay." I.C. § 35-38-2-3. In explaining this statute in the context of restitution payments, we acknowledged the underlying due process and equal protection principles enunciated in *Bearden v. Georgia*, 461 U.S. 660 (1983), by stating, "[b]efore incarcerating a probationer for failure to make restitution, the [trial c]ourt must inquire into

the reasons for the failure to make the required payments." *Barnes v. State*, 676 N.E.2d 764, 765 (Ind. Ct. App. 1997). If the trial court finds that a probationer has willfully refused to make restitution or has failed to make sufficient *bona fide* efforts to pay, his probation can be revoked. *Id*.

> However, if the trial court finds that the probationer is unable to pay despite sufficient *bona fide* efforts, the trial court must consider the imposition of alternative means of punishment rather than imprisonment. To imprison a probationer who is unable to comply with the financial conditions of his probation through no fault of his own without considering alternative means of punishment violates the fundamental fairness required by the Fourteenth Amendment.

Id. (citing *Bearden*, 461 U.S. at 672-73) (internal citation omitted).

Here, Hardacre, who had been convicted for nonsupport of a dependent child, was required to "pay child support as ordered by any [c]ourt," as a term of probation. (Appellant's App. p. 28). To prove that Hardacre had failed to meet this requirement, the State called Hardacre's probation officer to testify during the hearing. Through the probation officer's testimony, the State introduced two documents into evidenced: State's Exhibit #1, a print out of payments that had been made between September 25, 2006, and September 20, 2007; and State's Exhibit #2, the "docket sheet from the underlying paternity case." (Tr. p. 42). State's Exhibit #1 shows that Hardacre had made three twenty-five dollar payments, with one of those payments being voided for some reason, for a total of fifty dollars paid in child support during that one year period. State's Exhibit #2 shows that, until July 31, 2007, Hardacre's child support obligation was a total of eighty dollars per week, consisting of forty dollars per week for his current obligations, and forty dollars per week as payment on his arrearage. On

July 31, 2007, Hardacre's obligation was reduced to forty dollars per week for his current obligation, and ten dollars per week on his arrearage, which totaled $35,054.97 on that date. The State introduced no evidence in its case-in-chief regarding the reason for the paucity of Hardacre's child support payments. However, Hardacre's counsel called his client to the stand for the sole reason of establishing that Hardacre did not have the ability to pay. On cross examination, the State elicited from Hardacre that he had worked for approximately one month during the entire year and spent the rest of the time unemployed because he was "having a hard time finding work in his field[]." (Tr. p. 45).

Hardacre's argument assumes that our legislature intended to place the burden upon the State to prove that probationers have willfully refused to make child support payments or failed to make sufficient *bona fide* efforts to pay in circumstances such as these. However, we conclude that such an interpretation would run counter to Indiana law, which places the burden on the accused when facing allegations of failure to pay child support. *See* I.C. § 35-46-1-5(d); *see also Davis v. Barber*, 853 F.2d 1418 (7th Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989), and *Davis v. State*, 481 N.E.2d 434 (Ind. Ct. App. 1985), *reh'g denied*, *trans. denied*. In *Davis v. Barber*, the Seventh Circuit Court of Appeals considered Davis' petition for writ of habeas corpus in which Davis contended that his due process rights were violated when he was convicted for nonsupport of a dependant child, a conviction which we affirmed in *Davis v. State*, 481 N.E.2d at 437. Davis argued that Indiana impermissibly shifted the burden of proving his inability to pay upon him, but the Seventh Circuit rejected that argument by stating:

> Under Indiana law, a person acts "intentionally" when it is his conscious objective to engage in the conduct. Ind.Code. § 35-41-2-2(a). However, a person acts "knowingly" when he is aware of a high probability that he is engaging in the prohibited conduct. Ind.Code § 35-41-2-2(b). Thus, under the nonsupport statute, which permits conviction for *either* an intentional *or* a knowing act, the prosecution has the burden of proving beyond a reasonable doubt that the defendant *either* had the conscious objective *or* was aware of a high probability that he was failing to provide support. A person may be aware of a high probability that he is failing to provide support and still be unable to provide that support. Therefore, inability to provide support does not negate the mental element of "knowingly," which is sufficient in Indiana to hold a person criminally responsible for failure to provide support to a dependent child.

Davis v. Barber, 853 F.2d at 1424. Therefore, in light of *Davis*, we conclude that when the State has alleged a probation violation for failure to pay child support, the probationer carries the burden to prove his failure to pay was not willful, or that he has made sufficient *bona fide* efforts to pay the child support.

In sum, the State proved that Hardacre "recklessly, knowingly, or intentionally" failed to pay his child support by entering State's Exhibits #1 and #2 as evidence. Hardacre did not prove that his failure to pay was not willful or that he had made sufficient *bona fide* efforts to pay by testifying that he worked only one out of twelve months because he was having a hard time finding work in his field. Lack of employment alone is not an effort to pay, although, credible evidence of persistent attempts to gain employment might be evidence of sufficient *bona fide* efforts to pay child support in certain situations. Therefore, the probation violation

court's determination that Hardacre had violated his probation by failing to pay child support was supported with sufficient evidence.

CONCLUSION

For the foregoing reasons, we conclude that Hardacre's counsel at the probation revocation hearing was not ineffective and that the State presented sufficient evidence to prove that Hardacre violated his probation by failing to pay child support.

Affirmed.

ROBB, J., concurs.

BAKER, C.J., concurs in result with separate opinion.

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vs.	)	No. 48A02-0801-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAKER, Chief Judge, concurring in result.

I agree with the majority's decision to affirm the trial court's revocation of Hardacre's probation because Hardacre had operated a vehicle while intoxicated and consumed alcohol. However, I write separately regarding the discussion about whether Hardacre's failure to pay child support supported the revocation.

As the majority acknowledges, a trial court may revoke a person's probation upon evidence of a violation of any single term of probation. Washington v. State, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). Indeed, the trial court found from the evidence presented at the revocation hearing that Hardacre had operated a vehicle while intoxicated and consumed alcohol. Because this was sufficient to support the revocation of Hardacre's probation, slip

op. at 7, the discussion regarding Hardacre's failure to pay child support and whether that failure to pay was sufficient to support the probation revocation is unnecessary. Therefore, I concur in result.